92-1670

NO.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CLIFFORD FERGUSON, Petitioner

v

THE UNION CITY DAILY MESSENGER and
DAVID BARTHOLOMEW, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a sworn affidavit of one of the Respondent's co-workers stating that the Respondent constantly discussed the Petitioner in a negative manner, often mentioned the Petitioner's possible removal from office, and clearly wanted the Petitioner removed from office, presents a genuine issue of material fact as to whether the Respondent with the requisite malice published defamatory articles about Petitioner that resulted in his removal from office.

2. Whether the Tennessee Supreme Court was in error in holding that there was no genuine issue of material fact in the record as to whether the Respondents published defamatory statements with the requisite degree of fault required by this Court in New York Times v. Sullivan, 376 U.S. 254 (1964).

3. Whether the Tennessee Supreme Court was in error in holding that there was no genuine issue of material fact regarding whether the Petitioner was a public figure.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Tennessee Supreme Court.

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OPINIONS BELOW

1. The November 30, 1992, opinion of the Tennessee Supreme Court, whose Judgment is herein sought to be reviewed, although designated for publication, has yet to be reported and is reprinted in the separate Appendix to this Petition, at Page 1. The prior opinion of the Court of Appeals of Tennessee, Western Section, is unreported and is likewise reprinted in the Appendix to this Petition at Page 22. A written transcript of the oral ruling announced by the Circuit Court of Obion County is also reprinted in the Appendix to this Petition at Page 43.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Tennessee Supreme Court was entered on November 30, 1992. On December 10, 1992, Petitioner filed a petition to rehear in the Tennessee Supreme Court, which was denied on January 17, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the second section of the First Amendment to the Constitution of the United States, which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

This defamation action was initiated on January 29, 1988 in the Circuit Court for Obion County, Tennessee, at Union City by the Petitioner, Clifford Ferguson (hereinafter referred to as "Petitioner" or "Mr. Ferguson"). Mr. Ferguson's complaint alleged that the Respondents, the Union City Daily Messenger (hereinafter referred to as "Messenger"), and David Bartholomew (hereinafter referred to as "Bartholomew") intentionally and maliciously defamed Mr. Ferguson by virtue of numerous newspaper articles published by the Respondents.

On January 10, 1990, both parties appeared before the Circuit Court for Obion County to argue a Motion for Summary Judgment filed by the Respondents. The motion was heard on memoranda of counsel and the entire record in the cause, which included the depositions of all parties and numerous affidavits filed on various factual issues.

At the close of lengthy oral arguments of both counsel, the Circuit Court Judge announced his decision orally from the bench. According to the trial judge, Mr. Ferguson was not entitled to maintain his action for defamation on the grounds that he was a public official and the evidence before the court did not show actual malice with convincing clarity. (January 10, 1990, Ruling Page 4, 6).

On July 2, 1991, the Tennessee Court of Appeals, Western Section, entered an Order and filed an opinion reversing the trial court's ruling with regard to Mr. Ferguson's defamation action against both Respondents on the grounds that there was a genuine issue as to whether Mr. Ferguson was a public figure. The Tennessee Supreme Court, on November 30, 1992, reversed this ruling of the Tennessee Court of Appeals, and affirmed the initial granting of the Summary Judgment by the Circuit Court for Obion County.

Petitioner Clifford Ferguson's employment

with Obion County began on October 17, 1978, when Obion County Judge T. W. Jones hired him as the "Director of Accounts and Budgets." This position was designated in the county budget to serve in the Department of the County Judge. In 1979, the Obion County Commission adopted the Financial Management Act. As a part of the Act, a Finance Department was created as a separate line item in the Obion County budget. The Finance Department was directed by a seven person committee which appointed Mr. Ferguson the "Finance Director" of Obion County. Once appointed to this position, Mr. Ferguson hired Mrs. Vickie Graham to serve as his Secretary within the Finance Department.

The County Commission adopted The Financial Management Act to centralize the bookkeeping of Obion County; however, because the County Board of Education successfully brought suit against the county to be excluded from the centralized bookkeeping, it never

came to fruition. Nevertheless, Mr. Ferguson continued to serve as the "Finance Director" for any county department that voluntarily subjected its finances to the now defunct "Finance Department."

In June of 1983, the Budget Committee of the Commission recognized that due to the Board of Education's suit, the "Finance Department" no longer legally existed. As a result, it decided to place Mr. Ferguson's position back under the Office of the County Executive. In July of 1983, the County Commission approved the county budget wherein the "Finance Department" was deleted and Mr. Ferguson's position was listed as "Purchasing Agent" under the authority of the County Executive's Department. At the time that Mr. Ferguson's position was moved into the County Executive's Office, Mrs. Vickie Graham, his Secretary in the former "Finance Department," was also moved. From that point on, Mr. Ferguson never instructed Mrs. Graham to

perform any tasks, as he did when she was his Secretary in the "Finance Department." The two worked as co-employees and any instructions she received came from their supervisor, County Executive Jarvis.

Mrs. Graham left her employment with the county in June of 1984, and Mr. Ferguson was not allowed any input into the decision of who would replace her. In fact, when Mr. Ferguson told Jarvis of the availability of two qualified applicants, Jarvis told Mr. Ferguson that he would have nothing to do with the hiring of the replacement. The individual eventually hired by County Executive Jarvis was Ms. Treva Bond. Ms. Bond was never instructed by Mr. Ferguson as to what her duties were to be, nor did Mr. Ferguson treat Ms. Bond as his secretary. Likewise, County Executive Jarvis never informed Mr. Ferguson of Ms. Bond's exact duties. Ms. Bond and Mr. Ferguson worked together only as co-employees, and Mr. Ferguson did not learn what Ms. Bond's

exact duties were until State Auditors asked the county for job descriptions to detail the duties of each county employee. It was clearly listed in Ms. Bond's job description that the paying of county bills was her duty.

As Purchasing Agent for Obion County, Mr. Ferguson was only responsible for the purchasing procedures of the counties; he was not responsible for the paying of county bills. In fulfilling his responsibilities as Purchasing Agent, Mr. Ferguson followed the purchasing procedures set out in the Tennessee State Statutes. This procedure basically required Mr. Ferguson to send out letters seeking bids, choose the lowest bid submitted, and then send a purchase order to the vendor with the lowest bid. When the county placed an order to purchase goods or services, it was Mr. Ferguson's responsibility to forward a purchase order form to the vendor. On the form, the vendor was instructed to send the bill to the Purchasing Department.

When the bills from various vendors were received, it was Ms. Bond's responsibility to match the bill with the correct purchase order. Ms. Bond was then to fill out a "warrant," (a check) and have both Mr. Ferguson and County Executive Jarvis sign the check. Once both men signed the check, Ms. Bond was responsible for sending it to the vendor by placing the check in the mail.

Respondent David Bartholomew was at all times pertinent, a reporter or editor of the Respondent Union City Daily Messenger, the only newspaper published in Obion County, Tennessee. Among Mr. Bartholomew's duties with The Messenger was the reporting of the activities of Obion County government. In fact, Mr. Bartholomew held himself out to the citizens of Obion County as their "eyes and ears in county government."

Bartholomew was present at the County Commission meeting when Mr. Ferguson was initially hired by the Obion County

government. From that time forward, Bartholomew regularly attended the Commission meetings at which Mr. Ferguson was also present. Furthermore, Bartholomew also came into contact with Mr. Ferguson once or twice a week at the county courthouse.

At least until 1984, whenever Bartholomew would leave the Messenger newsroom to attend a Commission meeting, he would stop by the desk of a co-worker, Ms. Jean Green, and state in a loud voice, "they are going to fire your friend today," a reference to Mr. Ferguson. From the time that Mr. Ferguson began work with the county, Bartholomew had only negative things to say about him in the Messenger Newsroom. In fact, Bartholomew clearly wanted Mr. Ferguson removed from office. (See Affidavit of Jean Green attached in the Appendix, at page 61.)

Defendant Bartholomew read the Obion County Budget each year. The budgets for the fiscal year July 1, 1980, to June 30, 1981,

and July 1, 1982 to June 30, 1983, contained separate budget entries for the department of "Financial Administration." Included in the department were line items for the director's salary, the assistant director's salary, and the secretary's salary. However, the budget for fiscal year, July 1, 1983, to June 30, 1984, showed that there was no longer a salary apportioned for the director of "Financial Administration," but rather there was a salary for a "Purchasing Agent" in the Office of the County Executive. Also included in this budget was a line item under the County Executive's Office for a secretary. Other subsequent budgets contained similar entries.

Despite having knowledge of this information, Bartholomew in all or most of his post 1983 articles concerning county finances, consistently continued to refer to Mr. Ferguson as "Finance Director," or "Director of Accounts and Budgets," rather than the "Purchasing Agent" title shown in the county

budgets with which Mr. Bartholomew were intimately familiar. In addition, Mr. Bartholomew frequently referred to the defunct "Department of Finance," depicting Mr. Ferguson as the individual in charge of the non-existent department.

In March of 1985, Mr. Ferguson was hospitalized, leaving Ms. Bond in the office alone. Subsequently, Mr. Ferguson returned and in the summer of 1985, Ms. Bond took a maternity leave of absence. During this time, Mr. Ferguson discovered unpaid bills of the county in a folder turned backwards in a file drawer. He immediately brought this to the attention of County Executive Jarvis, who refused to do anything about this situation. In fact, Mr. Jarvis told Mr. Ferguson that he did not want to discuss the matter now or ever again. Having no authority to do more, and having brought the problem to his supervisor's attention, Mr. Ferguson felt he could do nothing else concerning Ms. Bond's failure to

properly administer and mail the above-described checks. The only individual with the authority to terminate Ms. Bond's employment was County Executive Jarvis.

In January of 1987, Mr. Ferguson once again found bills that should have been paid in late 1986. Furthermore, he also found certain invoices and checks which were signed by both he and County Executive Jarvis, randomly scattered throughout the office which he and Ms. Bond shared.

In January of 1987, it was discovered that the credit extended to Obion County by state agencies in Nashville had been cut off due to the fact that an invoice issued to the Obion County Sheriff's Department had not been paid. In covering the Sheriff's Department, Bartholomew had become personally acquainted with the Sheriff. During the Commission meeting in January, the Sheriff's Department was reprimanded for making purchases without submitting a purchase order to Mr. Ferguson.

After the meeting, Bartholomew stated to Mr. Ferguson, "Well, you have won another one."

On or about January 29, 1987, Defendant Bartholomew interviewed Mr. Ferguson about the past due bills from late 1986. This questioning was conducted in a belligerent and accusatory manner, and during the interview Bartholomew accused Mr. Ferguson of having a "sweetheart" deal with one of the vendors.

In the January 30, 1987, edition of The Messenger, a great deal of space was devoted to the failure of Obion County to timely pay its bills. The lead story in that issue, with the headline "County Bills Past Due As Suppliers Go Unpaid," discussed the cut-off of Obion County's credit by state agencies. The article referred to Mr. Ferguson as "Director of Finance and Purchasing" and referred to the "Department of Finance and Purchasing" as being Mr. Ferguson's office. The right half of the top of the edition consisted of a photograph depicting the bookkeeper of the

Defendant Messenger presenting past due bills to the "Director of Finance and Purchasing Clifford Ferguson." The lead story in that edition of the Defendant Messenger dealt with Obion County's failure to timely pay its bills, along with its day-to-day handling of various financial affairs.

In addition to these stories and photos, additional stories and graphs appeared on Page 7 of the Messenger. All of the reports at issue were authored and/or coordinated by The Messenger Editor, Respondent Bartholomew. Along with the lead story on the front page of The Messenger, another photograph and an article entitled "Ferguson says, paid as received," appeared on the front page. This article referred to, "Clifford Ferguson, the man who writes the checks to keep Obion County going..." and also referred to, "...his department, that of Finance and Purchasing...." The accompanying photograph depicted County Executive Jarvis signing a

check prepared by Ms. Treva Bond for payment of the invoices to The Messenger shown in the other photograph as being presented to Mr. Ferguson. The caption to the photograph referred to Ms. Bond as the "Secretary in the Department of Finance and Purchasing," and also referred to "her boss, Department Director, Clifford Ferguson."

The Respondent Messenger allowed these incorrect titles to be printed in this edition, despite the fact that its Editor and Chief Reporter, Respondent Bartholomew, had previous knowledge that Ms. Bond was not a secretary in the "Department of Finance," and that she was not under the supervision of Mr. Ferguson, but in fact County Executive Jarvis was her superior.

On Page 4 of the January 30 edition, an editorial authored by Bartholomew appeared. The editorial was entitled "Action Warranted," and dealt with the failures of the Obion County Financial Management System and the

opinion that the county-wide financial management system no longer "made sense." Page 7 of this same edition was also devoted entirely to this issue, with four or five articles constituting one-half of the page, and reproductions of documents taking up the remaining one-half page. These articles continued to refer to Mr. Ferguson as "Director of Financing and Purchasing," as well as to the "Department of Financing and Purchasing." In addition to the references concerning Mr. Ferguson in the articles, some of the documents reproduced also contained his name or references to his alleged position.

In May of 1987, a representative of a local electrical company met with County Executive Jarvis to discuss the non-payment of certain bills submitted by the company to the county. Both Ms. Bond and Mr. Ferguson were called into this meeting, and it was at this meeting that Mr. Ferguson first learned of the non-payment of the electric bills. Since Mr.

Ferguson had signed the checks along with County Executive Jarvis, he had assumed that the checks were being mailed by Ms. Bond.

The May 22, 1987, edition of The Messenger contained the following headline in large red letters: "County Repeatedly Late Paying Utility Bills." Under the right half of the headline was a reproduction of another document, and under the left half of the headline was a story concerning the failure of the "Department of Finance and Purchasing," to pay the county utility bills. The story also referred to "Clifford Ferguson, Director of Finance and Purchasing and his Secretary, Ms. Treva Bond." The story mentioned that $250.00 in penalty fees had been assessed against the County for the failure to timely pay its utility bills.

Once it became apparent that Obion County was failing to timely mail payments for its bills, a committee was appointed by the Obion County Commission to investigate the problem.

In addition, County Executive Jarvis dismissed Ms. Bond in May of 1987. The committee was comprised of three members of the Budget Committee who met on three occasions in Mr. Ferguson's office. It was at one of the committee meetings held in Mr. Ferguson's office that members of the committee found unopened mail dating back to October of 1986 in Ms. Bond's desk. As a result of these meetings, the committee made a recommendation to the Commission to abolish the already non-existent "Finance Department." The committee made this recommendation despite the fact that the Committee Chairman, Jean Cohen, found that Mr. Ferguson had done nothing wrong in his job performance.

In late May of 1987, Bartholomew again interviewed Mr. Ferguson and Ms. Bond. During this interview, Ms. Bond stated that she would accept full responsibility for the unpaid bills and late checks. Moreover, Mr. Ferguson specifically informed Bartholomew that he had

found unpaid bills and completed checks in Ms. Bond's desk as early as 1985. Bartholomew was also told of Mr. Ferguson's futile attempts to have something done about this situation.

The headline story of the May 26, 1987, edition of the Defendant Messenger was entitled "Special Committee Finds Financial Woes." The article spent much time discussing Clifford Ferguson and contained further references to the "Department of Finance and Purchasing," and to Clifford Ferguson, "Director of Finance and Purchasing." The articles did not discuss the job descriptions ordered by the state auditors which were distributed in the presence of Defendant Bartholomew, and which conclusively demonstrated that Ms. Bond was responsible for the bill payment failures. They also did not mention the statements of Ms. Bond to Mr. Bartholomew that she would take full responsibility for the non-mailed checks. Lastly, they did not mention the fact known to

Respondent Bartholomew that the problem had occurred before, and that Mr. Ferguson had attempted to have County Executive Jarvis do something about it, but he had refused.

As a result of these articles, which stated that Petitioner Ferguson was responsible for the unpaid bills, and due to the resulting pressure brought to bear by Obion County constituents caused by the articles, members of the Obion County Commission forgot the 1983 vote to abolish the "Department of Finance," and again voted on June 8, 1987 to abolish the non-existent "Department of Finance." On June 30, 1987, Mr. Ferguson received a termination notice from Obion County Government.

THE RULINGS BELOW

Mr. Ferguson's original complaint filed in the Circuit Court for Obion County, Tennessee alleged intentional and malicious defamation on behalf of Respondents Bartholomew and the Messenger, and

specifically pled the actual malice requirement as enunciated by this Court in New York Times v. Sullivan, 376 U.S. 254 (1964).

As stated earlier, the Circuit Court granted the Respondents Motion for Summary Judgment as to the defamation action. Specifically, the Circuit Court Judge, who announced his decision orally from the bench, ruled that Petitioner Ferguson was not entitled to maintain his action for defamation on the grounds that he was a public official, and the evidence as presented by Mr. Ferguson did not show actual malice "with convincing clarity." (January 10, 1990, Ruling, Appendix at page 50) The trial court reached this result despite the existence of the sworn affidavit of Jean Green, which he never mentioned in his ruling and which emphatically stated that Respondent Bartholomew clearly desired the removal of Petitioner Ferguson from office and constantly spoke negatively about him.

Petitioner Ferguson timely filed a Notice of Appeal to the Tennessee Court of Appeals on May 29, 1990. In the brief supporting the appeal, Petitioner Ferguson initially questioned the trial court's ruling as to the dismissal of the defamation action. Petitioner Ferguson asserted that if Mr. Ferguson was not a public figure "he did present enough proof under the negligence standard to defeat the Motion for Summary Judgment," and that if he was a public figure "he presented enough proof of actual malice to defeat the motion." (Appellate Brief, at page 29.) Petitioner Ferguson's brief went on to discuss various Supreme Court decisions interpreting the actual malice standard, including Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678 (1989) as well as Bose Corporation v. Consumers Union of United States, 692 F.2d. 189,196 (1st Cir. 1982), aff'd, 466 U.S. 493 (1984). Specifically, Petitioner noted that the Supreme Court in

Harte-Hanks found that circumstantial evidence of a defendant's state of mind may oftentimes be the only indication of whether the Defendant had actual malice when printing a defamatory article. Petitioner compared the instant case with that of Harte-Hanks, in that Respondent Bartholomew, like the Defendant in Harte-Hanks, "failed to verify his stories by checking documentation readily available to him that would have shed light on the controversy." (Appellate Brief, at page 34). Additionally, just as in Harte-Hanks, the Respondent Bartholomew had access to information which would have allowed him to "get to the bottom of the reason for the failure of Obion County to timely pay its bills." (Appellate Brief, at page 37). More importantly, the brief highlighted how Bartholomew actually knew the reason for the failure, the performance of Ms. Bond and the refusal of the County Executive to do anything about it, yet the articles blaming Mr.

Ferguson and his "department" were published. Mr. Ferguson's brief went on to discuss other facts and circumstances which could have led a jury to find actual malice on behalf of the Respondents, most notably the affidavit Jean Green. Also contained in Petitioner's brief to the Tennessee Court of Appeals was the allegation that Respondent Bartholomew's knowledge gained in the late May interviews with Ms. Bond and Mr. Ferguson "shows reckless disregard for the truth of statements" published by the Respondent Messenger in the late May issues. (Appellate Brief, at page 56).

The Tennessee Court of Appeals, in an opinion handed down on July 2, 1991, reversed the Circuit Court for Obion County, holding that the granting of summary judgment on the defamation claim was unwarranted. Unlike the trial court, the Tennessee Court of Appeals concluded that "there is a dispute as to whether Ferguson was responsible for seeing

that the bills of Obion County were paid." (Ct. of App. Opin., App. at page 35). According to the Court of Appeals, therefore, "there is a genuine issue of fact regarding the scope of Ferguson's responsibilities as Purchasing Agent, which is determinative of his status as a public official..." (Ct. of App. Opin., App. at page 36). Accordingly, since a party to a lawsuit has the right to have all disputed issues of fact decided by a jury, the Court of Appeals found that the determination of whether a Plaintiff in a defamation suit is a public official "is a question of law." (Ct. of App. Opin., App. at page 35). The Court of Appeals concluded that "the issue of Ferguson's scope of responsibilities must be determined before there can be an accurate decision as to whether he is a public official." (Ct. of App. Opin., App. at page 35-6.) Consequently, the Court of Appeals found that "Ferguson has a right to a jury trial on factual questions

involved in legal issues" and that "there is a genuine issue as to a material fact regarding the scope of Ferguson's responsibilities and summary judgment is not proper." (Ct. of App. Opin., App. at page 36).

Respondents Bartholomew and the Messenger appealed the ruling of the Tennessee Court of Appeals on the defamation cause of action. Petitioner Ferguson filed a brief in opposition to the appellate brief filed by Respondents. In this brief, Mr. Ferguson discussed the reasons why the Tennessee Court of Appeals decision on that issue was proper. Noting that the Court of Appeals "did not address the issue of whether there was fault on the part of the Defendants" the Petitioner stated that "it is possible that if he is held to be a private figure, Mr. Ferguson at trial may only be required to prove there was enough evidence in the record from which a jury could conclude by a preponderance of the evidence that the Defendants were negligent in

publishing the defamatory statements about him." (Supreme Court Brief, at page 40). In response to the contention by the Defendants that the Court of Appeals should have decided whether the record disclosed actual malice, Petitioner Ferguson stated that "it certainly would be unreasonable to require the Court of Appeals to decide if the proof in the record met the actual malice standard since that issue would become moot should the jury below resolve the disputed facts in a manner that requires a holding that Mr. Ferguson is a private individual." (S.Ct. Brief, at page 41).

Mr. Ferguson once again cited the Harte-Hanks case, to refute the allegations of lack of actual malice made by the Defendants, and went on to "discuss the state of the proof in the trial court in light of the requirements of the actual malice standard." (S.Ct. Brief, at page 42). Initially, Petitioner Ferguson's brief noted that a Plaintiff in a defamation

case "is entitled to prove the subjective state of mind of Defendants by use of circumstantial evidence..." (S.Ct. Brief, at page 44). Petitioner went on to list and discuss the circumstantial evidence which could lead a jury to find actual malice on the part of Respondents Bartholomew and the Messenger. Essentially, these facts and circumstances are identical to those discussed by the Petitioner in its Brief to the Tennesse Court of Appeals, as the Petitioner compared and contrasted the facts which occurred in Harte-Hanks with those of the instant case.

In conclusion, Mr. Ferguson argued that should the Tennessee Supreme Court determine that Mr. Ferguson was a public official, that United States Supreme Court's decision in "Harte-Hanks clearly indicates that the proof in the record is sufficient to conclude as a matter of law that a reasonable jury could find clear and convincing evidence to show that the false and defamatory statements at

issue were made with knowledge of their falsity or with reckless disregard or whether they were false or not." (S.Ct. Brief, at page 77).

The Supreme Court of Tennessee, in an opinion filed on November 30, 1992, reversed the decision of the Court of Appeals and affirmed the trial court's initial granting of summary judgment on the defamation issue. With regard to the defamation issue, the Tennessee Supreme Court came to the conclusion that "the news articles lay the primary responsibility for the unpaid bills at Ferguson's feet." (S.Ct. Opin., App. at page 6). Furthermore, the Supreme Court determined that "the record discloses the inescapable conclusion that Ferguson did not work cooperatively with Bond even though they worked in the same office." (S.Ct. Opin., App. at page 9.) Notwithstanding these conclusions, however, the Tennessee Supreme Court failed to find actual malice on behalf

of Bartholomew although the latter had information indicating that Petitioner Ferguson was not responsible for the failure of the County to pay its bills. Likewise, Respondent Bartholomew was aware of the fact that Treva Bond, the person of fault, was not Mr. Ferguson's secretary, yet he characterized her as such in all articles relating to Ferguson. Nevertheless, the Supreme Court recognized that the Court of Appeals "did not address the trial court's decision that there was insufficient evidence to support a finding of malice." (S.Ct. Opin., App. at page 12).

The Tennessee Supreme Court, unlike the Court of Appeals, did examine both the "actual malice" and "public figure" issues. After briefly discussing each, the Supreme Court concluded that "the evidence in this case requires no further analysis to reach the conclusion that Plaintiff was a public official within the meaning of Article I, § 19 of the Tennessee Constitution and the 1st

Amendment to the United States Constitution." (S.Ct. Opin., App. at page 19). According to the Supreme Court, "the Court of Appeals construed the factual issue too narrowly." The Court went on to find that "whether Ferguson or Bond had the primary duty to prepare the warrants for signature and mail the signed warrants to the vendors, which is the only basic fact disputed, is not determinative of a material issue in this case." (S.Ct. Opin., App. at page 20). Accordingly, the Court concluded that Petitioner Ferguson did have "substantial responsibility for and control over the conduct of the financial affairs of the County, which is an integral part of the government," thereby rendering him a public official. (S.Ct. Opin., App. at page 20).

The Supreme Court failed, however, to make any mention of the evidence supporting a finding of actual malice and did not even mention the Affidavit of Jean Green. Instead,

it relied on the trial court's finding that "there was no material evidence to support a finding of malice." Since the Court of Appeals made no findings with regard to actual malice, the Supreme Court concluded that "the record supports the finding of the trial court on the issue of malice and that decision is affirmed." (S.Ct. Opin., at page 14).

REASONS FOR GRANTING THE WRIT

Because Petitioner Ferguson was not given the opportunity to present evidence at trial from which a jury could find actual malice on behalf of the Respondents, the only evidence in the record which shows actual malice is contained in the affidavits and depositions of those individuals intimately involved with either Mr. Ferguson or the Defendants in some way or the other. Therefore, it was incumbent upon the trial court to view this evidence in a light most favorable to Mr. Ferguson as Respondent to the Motion for Summary Judgment.

Despite this duty, neither the Obion

County Circuit Court, the Tennessee Court of Appeals, or the Tennessee Supreme Court specifically examined the relevant evidence to determine if it was sufficient to avoid the granting of summary judgment.

Therefore, the first issue before this court is whether affidavits and other evidence filed in opposition to a summary judgment, which contained sworn testimony that the Respondents actively desired the removal of Mr. Ferguson from office, are sufficient to present a jury issue of actual malice on behalf of the Respondents. This Court's decision in Harte-Hanks clearly allows a defamation Plaintiff to use such circumstantial evidence to prove the existence of actual malice. The Court of Appeals and the Tennessee Supreme Court never considered evidence the in the record on the actual malice issue. Neither the Tennessee Court of Appeals nor the Supreme Court considered Harte-Hanks and the availability of

circumstantial evidence to prove actual malice. The trial court's analysis of this issue was incorrect as it held there was insufficient proof of actual malice despite the admissions of Bartholomew as to the knowledge he possessed and despite the affidavit of Jean Green.

The trial court, without even mentioning the affidavit of Jean Green, or any of the other proof of actual malice on the part of the Respondents addressed in Mr. Ferguson's 52 legal page Memorandum in Opposition to the Motion, conclusively stated that the record did not show actual malice with convincing clarity. The Tennessee Supreme Court, without any discussion on the proof in the record, merely affirmed that holding.

The second issue before this Court is the holding by the Tennessee Supreme Court that there was no genuine issue of material fact as to whether Mr. Ferguson was a public figure. The Tennessee Court of Appeals was correct in

holding that there were genuine issues as to the scope of Mr. Ferguson's responsibilities. Taken as true, the proof of Mr. Ferguson as respondent to the Motion for Summary Judgment, showed that he merely without discretion accepted bids for county purchases and wrote purchase orders for the lowest bids. Certainly, if Mr. Ferguson had been the Director of the County Finance Department, he would have been a public figure. But, as an employee in the Office of the County Executive that wrote purchase orders, he was not.

These issues were clearly decided by the Tennessee Supreme Court in contradiction to, if not in a total lack of consideration of, the principals set forth by this Court in a long line of First Amendment cases, and most specifically and most recently in the case of Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678 (1989). Mr. Ferguson's livelihood and reputation have been ruined without so much as an opportunity to

prove to a jury that it was intentionally and incorrectly done by Respondent Bartholomew. The granting of this Petition, which would allow a learned and proper application of this Honorable Court's authorities on the issues raised, would prevent this tragedy.

Respectfully Submitted,

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